



# CITY OF FALLS CHURCH

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November 8, 2010

Water Docket  
Environmental Protection Agency  
Mailcode: 28221T  
1200 Pennsylvania Ave., NW.  
Washington, DC 20460

To Whom It May Concern:

On September 7, 2010, the Commonwealth of Virginia issued a Chesapeake Bay TMDL Phase I Watershed Implementation Plan ("Draft WIP"). On September 22, 2010, the United States Environmental Protection Agency ("EPA") issued a Notice for the Public Review of the Draft Total Maximum Daily Load ("Draft TMDL") for the Chesapeake in the *Federal Register*. The purpose of this letter is to submit comments in response to the EPA Federal Register Notice and Virginia's Draft WIP on behalf of the City of Falls Church, Virginia. We appreciate the opportunity to provide comments on these documents, both of which will have profound impacts on our community and drive increased efforts to restore the Chesapeake Bay through 2025 and beyond.

Both draft documents outline sector-specific implementation measures for the different source categories that impact the bay. The ultimate responsibility for controlling most of these source sectors falls to local governments; and the cost to comply with the controls proposed will be borne by the same local tax and rate payers. Of these sources, the City of Falls Church is primarily concerned with the strategies for controlling urban stormwater runoff.

## **Urban Stormwater Costs**

While the Draft WIP lacks clarity on what the exact requirements would be for urban and suburban stormwater, EPA's Draft TMDL defines an aggressive backstop allocation of retrofitting 50% of impervious land. The backstop is a primary concern given its tremendous potential to become the centerpiece of our Virginia Pollutant Discharge Elimination System General Permit for Small Municipal Separate Storm Sewer System ("MS4") and primary driver of expenditures in stormwater management for the next 15 years.

Although there is a limited amount of information available to assess how much it will cost to implement EPA's Draft TMDL. A national engineering firm with expertise in this area has recently prepared an estimate for how much it would cost Virginia's MS4 localities over a 15 year term, solely to treat 50% of existing impervious coverage. Shockingly, this analysis concludes that

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for urban stormwater controls, the TMDL would have an annual, per household cost of \$678 per year in 2011 and possibly as high as \$1,717 in 2025. Given the current economic conditions, these initiatives could not be coming at a more difficult time.

One of the main limitations on fully accomplishing the Bay restoration has been the tremendous cost. EPA's failure to consider cost, cost-effectiveness, or cost-benefit in its Draft TMDL ignores an important, maybe fundamental, aspect of the problem. We recognize that TMDLs do not typically address cost issues and that debates about the feasibility and cost of implementing a TMDL are typically the province of a use-attainability analysis (UAA). However, EPA has clearly stated during regional meetings that it will not allow a UAA with regard to the Chesapeake Bay; foreclosing this ordinarily available and lawful option. A sound strategy for improving water quality to levels required by EPA will not succeed unless the economic costs associated with these efforts are fully understood, and a plan is developed for distributing these costs among the different levels of government.

### **Reasonable Assurance**

The EPA has concluded that Virginia's WIP fails to comply with EPA's July 1, 2010 and August 13, 2010 nutrient and sediment allocations and does not adequately establish reasonable assurance. EPA has established what it is calling a "backstop allocation" in response. This backstop is meant to "...reduce the point source loadings as necessary to compensate for the deficiencies EPA identified in the reasonable assurance components of the jurisdictions' draft Phase I WIPs addressing nonpoint source reductions." This approach to urban stormwater differs from the approach taken by Virginia in its Draft WIP. Virginia's Draft WIP does not mandate retrofits/restoration.

The EPA's view of reasonable assurance in this TMDL is unprecedented at the federal or state level. EPA has written and/or approved thousands of TMDLs for impaired waters across the United States. Because the phrase "reasonable assurance" is undefined in either the Clean Water Act or in regulations or in guidance, EPA's approach to reasonable assurance has ranged from liberal to more conservative. For this reason, we question the EPA's determination to reject Virginia's Draft WIP and develop a "backstop" based upon reasonable assurance grounds. This issue must be addressed before EPA issues its final TMDL.

### **Chesapeake Bay Modeling Concerns**

Another significant concern is the nearly absolute reliance on modeling rather than looking directly at outcomes in the Bay. While this model has seen years of development it continues to experience fundamental flaws that call its credibility into question. Similarly Virginia is convinced that the manner in which it has been used for this Bay-wide TMDL assumes a level of precision far beyond what the model is capable of and without regard for the economic consequences. This "inputs based" rather than "outputs based" approach hurts the credibility of the overall effort.

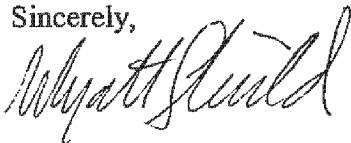
The development of the Bay models has required thousands of hours of time from dozens of EPA staff over many years. However, EPA has not provided an opportunity for the public to understand how the models work and the implications of changes to the input data sets for model results. These results define the allocations that EPA has proposed in the TMDL. Therefore, although the model is defining regulation, it very much represents a "black box" for purposes of adequate public review and comment. We do not believe EPA itself has fulfilled its obligation to ensure that its modeling framework is adequate to support its TMDL and the accompanying WLAs and LAs. If EPA presses forward with finalizing the TMDL over the objections of Bay dischargers and interested stakeholders, despite the faulty model that it has put forth in support of its TMDL, its decision to do so will be arbitrary and capricious.

### Looking Forward

The City of Falls Church is committed to restoring the Bay. However, no matter how laudable the intentions behind the development of the Chesapeake Bay TMDL, the most certain outcome will be another disappointing program failure if indifference at the federal level to economic and fiscal impacts continues. If concerns related to costs are not analyzed and addressed at the early stages of this initiative, the entire program will fail under the weight of the economic burdens it will impose upon many local governments and businesses and then to individual households. We understand, from EPA's public comments, that cost is not one of their considerations in developing the TMDL. However, without a firm understanding of the costs and how the burdens of meeting these costs will be distributed, there will be neither equity nor the true "partnership" advocated by the state and EPA, and local governments will be set up for failure.

Finally, in developing the Chesapeake Bay TMDL, we must all remember that the current conditions in our urbanized watersheds developed over many decades and that most of the land is privately owned. Plans and programs developed under the current initiatives need to take into account what can be achieved by localities, given their unique policy and budgetary constraints over the short and long-term. If the costs of these stormwater management efforts are made to be too high, or if the stormwater management standards effectively become unattainable, these beneficial redevelopment efforts will be hindered.

Sincerely,



Wyatt Shields  
City Manager

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